Supreme Court, U.S.
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No. 02-1616

In The

Supreme Court of the United States

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF
THE SUPREME COURT OF INDIANA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Indiana**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with the First Amendment, a lawyer may be publicly reprimanded for impugning the integrity of a court in a brief without having a factual basis for doing so.

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STATEMENT OF THE CASE

Indiana attorney Michael Wilkins was publicly reprimanded by the Indiana Supreme Court in a lawyer discipline case for making groundless statements accusing judges of the Indiana Court of Appeals of deciding a case to achieve a desired outcome in conscious disregard of the facts and law. Wilkins' accusatory statements were contained in a brief to the Indiana Supreme Court. Advocacy speech by lawyers appearing on behalf of clients is constrained in many ways. Given the important state interests involved in fostering broad public respect for the judiciary, it does not violate the First Amendment for the states to insist that controls on in-court advocacy speech include a prohibition against impugning judicial integrity with no basis in fact.

Wilkins was reprimanded for making the following accusation against the court of appeals in a brief supporting a petition seeking supreme court review of that court's decision in *Michigan Mutual Ins. Co. v. Sports, Inc.*, 698 N.E.2d 834 (Ind.App. 1998), *trans. denied*, 706 N.E.2d 555 (Ind. 1999):

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

Pet. App. at 3a. As a result of the offending footnote, the supreme court struck the brief as "[a] scurrilous and intemperate attack on the integrity of the Court of Appeals," 706 N.E.2d at 555, but nevertheless reviewed the petition for transfer on its merits and denied the same. *Id.*

The only authoritative basis for the supreme court's action in striking the brief could have been Ind. R. App. P. 42.[1] Contrary to Wilkins' assertion, Pet. at 3 n. 3, it did not exercise its contempt jurisdiction when it struck the brief.[2]

Thereafter, the Indiana Supreme Court Disciplinary Commission filed a professional discipline complaint against Wilkins, alleging that the statements in the *Michigan Mutual* brief violated Indiana Rule of Professional Conduct 8.2(a).[3] Wilkins did not file an answer or raise any affirmative defenses in a responsive pleading in the discipline case. He formally raised his constitutional defense for the first time in his trial brief, filed just more than a week before trial and after final witness and exhibit lists had been submitted. Respondent Michael Wilkins' Trial Brief, pp. 19-22. In discussing the First Amendment argument in his trial brief, Wilkins did not assert that that the burden of proving falsity of the statements in the *Michigan Mutual* brief fell on the Disciplinary Commission or that the Disciplinary Commission's

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[1] Ind. R. App. P. 42 states: "Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after the service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter."

[2] Thus, Wilkins is incorrect when he states, Pet. at 5, that the supreme court's reprimand was a second punishment.

[3] Ind. Prof. Cond. R. 8.2(a) states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." ABA Model Rule of Professional Conduct 8.2(a) is identical.

charge of reckless disregard had to be proved by a subjective, rather than an objective standard. Instead, his First Amendment claim focused on the contention that footnote 2 was protected speech because it was a statement of pure opinion, not a statement of fact that was provably true or false.

After the hearing officer issued his findings of fact and conclusions of law, Wilkins petitioned the Indiana Supreme Court to review the case. When a party petitions for review, the Indiana Supreme Court conducts a de novo review, albeit one limited to the factual record developed in front of the hearing officer. *Matter of Hefron*, 771 N.E.2d 1157, 1159 (Ind. 2002). In his petition for review and supporting brief, Wilkins, again, did not argue that the First Amendment required the Disciplinary Commission to shoulder the burden of proving the falsity of the statements in footnote 2 or that the reckless disregard standard had to be a subjective one. Instead, he concentrated his First Amendment challenge on the claim that the statements in footnote 2 were "not capable of being true or untrue as a matter of fact." Brief in Support of Petition for Review of the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation, p.13.

In its decision, the Indiana Supreme Court found that Wilkins' footnote 2 violated Ind. Prof. Cond. R. 8.2(a). The court found that other "heavy-handed" statements in the brief did not violate Prof. Cond. R. 8.2(a) because they roughly paraphrased legitimate grounds for seeking review of lower court decisions. These statements charged that the lower court decision "erroneously and materially misstates the record by making affirmative misstatements regarding the evidence" and that the decision "is quite disturbing" because it is "replete with misstatements of

material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point." Pet. App. at 6a-7a.

The statements in the footnote, however, violated Prof. Cond. R. 8.2(a) "because they were made with reckless disregard as to the truth or falsity concerning the integrity" of the lower court judges. Pet. App. at 7a. In rejecting Wilkins' claim that his statements were protected by the First Amendment, the court relied on Rule 8.2's concern "with preserving the public's confidence in the administration of justice." Pet. App. at 8a. Wilkins cited no evidence in the appellate record to support the footnote 2 accusation, and there was none. If Wilkins had evidence of improper judicial conduct outside the record, it could have been presented to the Judicial Qualifications Commission, Indiana's body charged with enforcement of the Code of Judicial Conduct. Pet. App. at 9a.

The court also held that the statements were unprotected because they were made in an appellate brief governed by Indiana's appellate rules. The rules require that briefs be "supported by cogent reasoning, citations to authorities, statutes or the record." Pet. App. at 9a, *quoting*, Ind. R. App. P. 46(A)(8)(a). Whether a lawyer's statement in an appellate brief makes an accusation that impugns judicial integrity or addresses some other topic, if it is factually unsupported in the record, it is not allowed by Indiana's appellate rules. Ind. R. App. P. 46(A)(6)(a).

In a reciprocal disciplinary proceeding in the local federal district court, the court declined to additionally reprimand Wilkins because discipline in addition to that assessed by the Indiana Supreme Court was "not necessary." Pet. App. at 35a. Wilkins' implication, Pet. at 9, that

the federal court declined to assess a further sanction based on the First Amendment arguments Wilkins presented to that court is wrong.

REASONS FOR DENYING THE PETITION

The questions presented by the petition share in common the single question whether the constitutional standard for protecting speech in the defamation context established by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny applies with full and equal force to a professional disciplinary proceeding resulting in the reprimand of a lawyer who makes groundless statements impugning judicial integrity during a court proceeding.

The Indiana Supreme Court, consistent with prior Indiana authority, has expressed solicitude for legitimate lawyer advocacy, but has not fully embraced *New York Times* as the correct expression of the limits to state regulation of in-court lawyer speech. The clear consensus of state high courts and federal courts of appeals is that a different standard is warranted because of the unique role of lawyers acting as officers of the court and the state's compelling interest in fostering public confidence in the fundamental integrity of judicial processes. The decision of the Indiana Supreme Court in this case is consistent with those other cases. None of the lower court authorities cited by Wilkins fully accepts *New York Times* and the cases interpreting it as the First Amendment standard for regulating in-court lawyer speech. There is no split of authority meriting the Court's review.

This Court has given deference to the traditional state supreme court function of determining who is fit to practice law and what lawyer conduct is worthy of regulation. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982). Its treatment of claims by lawyers held professionally accountable for impugning judicial integrity is no exception. See, *Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001), *cert. denied*, 535 U.S. 930 (2002); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996), *cert. denied*, 520 U.S. 1155 (1997); *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996), *cert. denied*, 519 U.S. 1111 (1997); *Matter of Garringer*, 626 N.E.2d 809, 813 (Ind.), *cert. denied*, 513 U.S. 826 (1994); *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 502 U.S. 1009 (1991); *Matter of Westfall*, 808 S.W.2d 829 (Mo.), *cert. denied*, 502 U.S. 1009 (1991); *In re Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 820 (1990); and *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981).

I. The First Amendment claim was not fully and timely raised below.

Wilkins argues that the First Amendment standard to be applied to in-court statements by lawyers who impugn judicial integrity is the standard set forth in *New York Times v. Sullivan* and its progeny. In *New York Times*, this Court held that the constitutional standard for recovery of defamation damages by a public official is that the party seeking damages must prove "that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. Later cases clarified that the *New York Times* standard, as applicable to statements

made about public officials, public figures and nonpublic persons who are involved with important public questions, is comprised of three elements. First, proof of actual malice demands a showing by the damage claimant that the speaker had either actual knowledge of falsity or was subjectively reckless regarding the veracity of the statement in question. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *St. Amant v. Thompson*, 390 U.S. 729, 731 (1968). Second, in reckless disregard cases, the damages claimant must still carry the affirmative burden of proving that the statement in question was actually false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986). Third, allegedly defamatory speech may not be punished if it makes assertions that cannot be reasonably interpreted as stating facts or are not susceptible of being proved true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).[4]

Ind. Admis. Disc. R. 23(14)(a), as it was in effect at the time the disciplinary charge was filed, stated in relevant part: "The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense." Wilkins opted to not answer the complaint and, accordingly, did not raise the First Amendment defense in a responsive

[4] The standard of proof to be borne by the damages claimant is "clear and convincing evidence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That is not an issue here, because in Indiana lawyer discipline actions the burden of proof is on the Disciplinary Commission to prove its claims by clear and convincing evidence. Ind. Admis. Disc. R. 23(14)(h).

pleading. Rather, he formally raised a First Amendment defense for the first time in his trial brief, filed just more than a week before trial and after final witness and exhibit lists had been filed. Respondent Michael Wilkins' Trial Brief, pp. 19-22. Even then, Wilkins did not assert that the First Amendment demanded that the Disciplinary Commission bear the burden of proving falsity. Nor did Wilkins make a First Amendment claim that in a reckless disregard case the standard must be subjective, rather than objective. Instead, he confined his First Amendment claim to the contention that statements of opinion that are not susceptible of being proved true or false enjoy constitutional protection. Even in his petition to the Indiana Supreme Court for review of the hearing officer's findings of fact and conclusions of law, Wilkins restricted his First Amendment argument to the claim that footnote 2 was protected speech because it was not provably true or false.

Part of Wilkins' argument includes the claim that the Disciplinary Commission had the burden of proving the actual falsity of the factual assertions in footnote 2. Pet. at 6. The state of Indiana law at the time of the hearing on the merits in *Wilkins* was that in a reckless disregard case the lawyer may not attempt to prove for the first time during his discipline case that the earlier statement was unwittingly true; hence, when a statement was recklessly made, an after-the-fact attempt to decipher the truth of the offending statement is unavailing. *Matter of Atanga*, 636 N.E.2d 1253, 1258 (Ind. 1994); *Garringer*, 626 N.E.2d at 813. In sum, the Indiana position is that a lawyer who makes a statement impugning judicial integrity after making a reasonable investigation will not be held professionally accountable, even if the statement should turn out

to be untrue. Conversely, if a lawyer groundlessly makes such a statement, the lawyer will be held professionally accountable even if, by dumb luck, the statement should turn out to be true. The inquiry, under the Indiana scheme, is on the quality of the lawyer's inquiry at or before the time he makes the statement. In light of the established Indiana law on this question, by failing to timely raise his burden of proof claim in a responsive pleading or otherwise in advance of the hearing on the merits, Wilkins deprived the Disciplinary Commission of fair notice of the extent of his constitutional arguments so that the Disciplinary Commission could have undertaken to prove the falsity of the factual assertions contained in footnote 2. By failing to raise his First Amendment burden of proof claim at all in the state court, Wilkins did not timely raise that aspect of his constitutional question, and so it is not properly before the Court for review. Sup. Ct. R. 14.1(g)(i). Likewise, because he failed to timely raise his First Amendment claim that reckless disregard is to be measured subjectively, not objectively, that question, too, is not properly before the Court. *Id.*

The practical effect of placing the burden of proving falsity on the lawyer disciplinary agency in reckless disregard cases will be to require those agencies, even when the attack on judicial integrity was groundless, to hail respected judges into court to be examined and cross-examined about, for example, their internal thought processes, as in this case, or to disprove that they consciously concealed federal crimes. See, e.g., *Garringer*, 626 N.E.2d at 811. Indeed, at least in the case of federal judges, this might be impossible. See, e.g., *Matter of Cook*, 49 F.3d 263, 265 (7th Cir. 1995) ("[T]he [Illinois Attorney

Registration and Disciplinary Commission] issued a subpoena requiring [federal district court] Judge Rovner to appear and submit to cross-examination about the proceedings in her court and the rationale for her findings. Not surprisingly, she declined, observing that federal judges speak through their opinions, and that their mental processes are not subject to examination.")

II. There is no conflict between this case and similar cases decided by federal courts of appeals and other state courts of last resort.

In declining to fully extend *New York Times* and its progeny to in-court lawyer speech that impugns judicial integrity, the Indiana Supreme Court acted consistently with cases decided by the other state high courts and federal courts of appeals. Unquestionably, lawyer speech in this context enjoys First Amendment protection, but the lower courts universally share the view that it should not be identical to the standard that applies to ordinary citizen speech in public about persons or matters of public concern. The cases relied upon by Wilkins do not support his claim that there is a split in lower court authority.

The organizing principle underlying the numerous lower court decisions in this area is that a different standard of protection is warranted in in-court speech cases because of the special role played by lawyers in the administration of justice. The lower courts have consistently recognized the need to strike an appropriate balance between the free speech rights of lawyers and the responsibility of legal advocates to eschew unfounded and reckless attacks on the integrity of the judicial system.

Most of the cases relied upon by Wilkins in support of his claim of a conflict in lower court authority are factually distinct from this case because they deal with lawyer speech to news media or in some other out-of-court setting. See, *Topp*, 925 P.2d at 1116 (interview with local news media); *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437-38 (9th Cir. 1995) (statements to and advertisement in local newspaper and statement to publisher of judicial almanac); *Westfall*, 808 S.W.2d at 837 (interview with local television station); *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41 (release to news media of letter to chair of public policy taskforce); *State ex rel. Oklahoma Bar Association v. Porter*, 766 P.2d 958 (Okla. 1988) (statements to local news media); *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988) (statements to local newspaper); *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406, 409 (La. 1983) (letter to and advertisement in local newspapers); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d at 168 (press conference to local media); *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 431 (Tex. 1974) (letters to the editor of local newspaper). *In re Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995) was a hybrid case, where the lawyer made statements impugning judicial integrity in motions to courts and in correspondence with administrative officials and prosecutors; as was *Graham*, 453 N.W.2d at 315, where the lawyer impugned judicial integrity in court filings and in correspondence to a United States Attorney and a federal appeals court judge. In fact, *Semaan* specifically noted that its willingness to use *New York Times* as the standard was limited to "utterances made outside the course of judicial proceedings." 508 S.W.2d at 432-33. *Douglas*, relying on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), also explicitly

differentiated out-of-court lawyer speech from in-court statements. 370 S.E.2d at 332.

The balance of competing state interests is very different when lawyers speak out-of-court as citizens versus when they formally act as officers of the court by addressing tribunals on behalf of their clients. Indeed, the very foundation of Fed. R. Civ. P. 11 and its state analogues rests on the notion that courts have considerable leeway to regulate the conduct of counsel appearing before them. Rule 11-type standards demand no less of counsel than Prof. Cond. R. 8.2(a) – "an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). The logic of Wilkins' First Amendment position is that courts are so restricted in their ability to regulate in-court lawyer speech that it was a violation of his or his client's constitutional rights for the Indiana Supreme Court to even strike his *Michigan Mutual* brief pursuant to Ind. R. App. P. 42.

The cases cited by Wilkins that deal with in-court statements uniformly apply a different standard than *New York Times* because of the state's compelling interest in shielding the judicial system from unfounded attacks on its integrity by advocates. In *Ray*, 797 So.2d at 559 (applying an objective standard to the reckless disregard branch of the actual malice standard), the Florida Supreme Court rejected a full-fledged application of the *New York Times* standard to in-court lawyer speech because of the compelling interest states have in "preserv[ing] public confidence in the fairness and impartiality of our system of justice." *Id.* at 558-59. See also, *Graham*, 453 N.W.2d at 321-22 (applying an objective standard to the reckless disregard branch of the actual malice standard). Without explicitly

discussing the applicability of the *New York Times* standard, the Kentucky Supreme Court has similarly given important weight to the state's interest in protecting public confidence in the integrity of the judicial system by regulating groundless, in-court lawyer speech. *Waller*, 929 S.W.2d at 183 (referring to judge in a pleading as a "lying incompetent ass-hole"). Without specifically discussing the *New York Times* standard, in *In re Frerichs*, 238 N.W.2d 764, 767 (Iowa 1976), the Iowa Supreme Court, relying on language from Justice Stewart's concurring opinion in *In re Sawyer*, 360 U.S. 622, 646-47 (1959), stated that lawyers, because of their professional role, are properly held to a different standard when making in-court attacks on the integrity of the judicial system than are members of the general public, and rejected subjective intent as the proper measure of the lawyer's conduct. *Id.* at 770.

Wilkins points to *In re Green*, 11 P.3d 1078 (Colo. 2000) as a case that supports the view that the *New York Times* standard fully applies to in-court lawyer speech. Pet. at 16. This mischaracterizes the case. The *Green* court looked to the *New York Times* standard only by analogy and to support its finding that the lawyer's statements were pure opinion and not statements of fact amenable to being proved true or false. The *Green* court explicitly avoided reaching the question whether the reckless disregard standard ought to be objective or subjective. *Id.* at 1086. The court acknowledged, however, the numerous authorities holding that the reckless disregard test for lawyers should be governed by an objective standard. *Id.* at 1086 n. 7.

It is not just state high courts that have recognized the importance of incorporating into the First Amendment calculus consideration of the special role of lawyers and

the state interest in preserving the public's respect for judicial institutions. In *United States District Court for Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993), the court of appeals held that the First Amendment reckless disregard standard is an objective one when applied to in-court speech. See also, *Yagman*, 55 F.3d at 1437-38. The court of appeals in *Palmisano* also held that the *New York Times* standard is not fully applicable to in-court lawyer speech to the same extent as it applies to discourse about public issues and personages. "[T]he Constitution does not give attorneys the same freedom as participants in political debate." 70 F.3d at 487.

Contrary to Wilkins' claim, there is not a split of authority on the question whether in-court lawyer speech that impugns judicial integrity enjoys First Amendment protection under the unalloyed standard developed by this Court in *New York Times* and its progeny. Most of the cases he relies upon to illustrate a split of authority arise in the very different factual context of out-of-court lawyer speech to the news media or in other unrestricted public forums. The balance of the cases he relies upon uniformly recognize that a different First Amendment standard applies when lawyers make groundless, in-court statements that impugn judicial integrity.

III. The Indiana Supreme Court did not reject Wilkins' claim that there is a cognizable distinction under the First Amendment between statements of fact and statements not provably true or false. It merely disagreed that footnote 2 was not a statement of fact.

In *Milkovich*, this Court rejected the artificial distinction between statements of fact and statements of opinion

as a helpful demarcation between constitutionally restrainable versus unrestrainable speech. Rather, because statements of fact can be readily cloaked in statements of opinion, the focus must be on the susceptibility of a statement to be proved true or false or whether it is a statement, even by implication, of fact at all. 497 U.S. at 19-20. Contrary to Justice Sullivan's dissent in *Wilkins*, Pet. App. at 12a, Wilkins' statement in footnote 2 was not mere rhetorical hyperbole incapable of being proved true or false. Rather, it was a statement of fact, thinly veiled by the pseudo-speculative, introductory language: "one is left to wonder whether. . . . " This transparent veneer of speculation gives footnote 2 as little constitutional cover as does the statement, "In my opinion, John Jones is a liar." *Id.* at 19.

Wilkins' statement of fact was that the court of appeals judges in *Michigan Mutual* were "determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision.)" Footnote 2 was no less a statement of fact merely because it alleged facts that were internal to the thought processes of the judges. Nor was it a statement that was inherently unprovable as true or false, such as would be, for example, a statement that the court of appeals' opinion imposes unjustifiable risks on casualty insurers. Were statements about state of mind inherently unprovable, it would be futile in our judicial system to attempt proof of criminal scienter; yet it happens every day. Indeed, in *Milkovich*, this Court held that an accusation of perjury, which contains an element of criminal scienter, is "susceptible of being proved true or false." *Id.* at 21.

Neither in *Wilkins* nor elsewhere has the Indiana Supreme Court rejected Wilkins' claim that *Milkovich*

protects statements that are not factual in nature or are not provably true or false. It implicitly disagreed with the premise of Wilkins' argument that footnote 2 should enjoy the First Amendment protection afforded by *Milkovich* as a statement not susceptible of being proven true or false. "The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible appellate advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome." *Wilkins*, Pet. App. at 30a. Thus, "the necessary effect of the judgment" of the Indiana Supreme Court was not to deny Wilkins' claim under *Milkovich*. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Whether the Indiana Supreme Court was right or wrong to treat footnote 2 as a statement of fact does not raise a substantial federal question that makes this case appropriate for Supreme Court review. Unless *all* lower court decisions determining that a statement is one of fact that is verifiably true or false are sufficiently important to merit Supreme Court review, there is nothing in the Indiana Supreme Court's decision that justifies granting certiorari.

IV. Because of the state's compelling interest in fostering respect for the courts, in-court lawyer speech is not entitled to the same protection as public speech by citizens about persons and issues of public import.

This Court has never held that the constitutional standard articulated in *New York Times* and its progeny is the constitutional measure of all speech by all citizens in

every context. Instead, the precise constitutional balance must be struck by taking into account other legitimate and compelling state interests that compete with the important state interest in encouraging public debate on matters of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974).

Lawyers, as legal representatives, are not like other citizens. They are granted a monopoly over the right to act as attorneys at law on behalf of their principals in court proceedings. Lawyers are required to acknowledge from the outset the special responsibilities that accompany their unique status. In Indiana's oath of attorneys, similar to the oath taken by lawyers in many states, new lawyers commit to "maintain the respect due to courts of justice and judicial officers. . . . " Ind. Admis. Disc. R. 22.[5] Lawyers, as members of a regulated profession, are different in many ways from ordinary citizens. To cite just one example, parties to litigation may communicate directly with each other, notwithstanding the fact that they are represented, but a lawyer may not speak to a represented party without the consent of opposing counsel. Ind. Prof. Cond. R. 4.2.[6]

Especially in civil litigation, the court system exists to resolve disputes between private litigants that cannot be

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[5] While it is true that judges should be able to thrive in a "hardy climate," *New York Times*, 376 U.S. at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)), they should not have to thrive in an unfair one. Because judges are human, the quality of justice may suffer when they are bombarded with unfounded ad hominem attacks.

[6] ABA Model Rule of Professional Conduct 4.2 is substantially the same.

peaceably resolved in some other setting. The courts are a heavily subsidized and overburdened public resource dedicated to resolving private disputes. So statements to courts by lawyers are not the same as statements made to the world on the sidewalk in front of the courthouse or in an advertisement in a newspaper. The rough and tumble of political debate on issues of public import is not a model that accurately reflects the controlled and deliberative process by which judicial decisions are and should be made. By availing themselves of the resources of the court system for the benefit of their clients, lawyers knowingly accept myriad limits on their speech imposed by procedural rules governing trials and appeals.

In addition to the state's interest in regulating the way in which evidence and arguments are presented to courts, the state also has a compelling interest in protecting the court system from being held up to groundless criticism because of its interest in preserving "public confidence in the fairness and impartiality of the system of justice."[7] *Florida Bar v. Ray*, 797 So.2d at 558-59. Indeed, because of their intimate knowledge of the workings of the system of justice, lawyer commentary about courts and judges will be given greater weight by the public than statements by outsiders.

The court system plays a central role in the functioning of civil society. It exists, in no small part, to provide a

[7] It is true that it also protects public confidence in judicial institutions when judicial corruption is exposed and punished. But that laudatory goal is not furthered by reckless allegations that judges have abandoned their ethical duties and decided cases without regard to the facts and the law. See, *Palmisano*, 70 F.3d at 487.

means for the peaceful resolution of disputes. In order for courts to effectively discharge their responsibility, they must enjoy the respect of the litigants who come before them, for if judicial pronouncements are widely held to be corrupt, we are little better off than if we had no court system at all. Of necessity, courts must heavily rely upon the inherent force of their pronouncements and the willingness of litigants to voluntarily comply. That is why unfounded speech that has the effect of eroding the integrity of the courts in the eyes of the public is so insidious. Lawyers, as officers of the courts and integral actors in the business of the courts, can readily plant the seeds of public cynicism about the integrity of the system of justice if they are allowed the unfettered ability to make groundless statements that erode public confidence in the court system.

We do not wish to overstate our point. The government is certainly not free to arbitrarily and capriciously limit what lawyers may say when acting as advocates for their clients and causes. The speech of advocates in court proceedings has to be robust in order for our adversarial system to flourish. The Indiana Supreme Court has championed this view:

> [W]e cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. . . . It will have a chilling effect upon the exercise of the right to appeal. It will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent. . . . [W]e must invite, not inhibit, the presentation of new and creative argument. . . . "

Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152-53 (Ind. 1987), *quoted in Wilkins*, Pet. App. at 29a. Indeed, the Indiana Supreme Court held that all argument in the

Michigan Mutual brief with the exception of footnote 2 was, while perhaps "heavy-handed," not a violation of Ind. Prof. Cond. R. 8.2(a). *Wilkins*, Pet. App. at 7a.

The issue is whether the limits of constitutional protection for in-court lawyer statements must be congruent with the constitutional standard applicable to citizen speech about persons or matters of public interest. Because of the specialized and unique role played by lawyers in the administration of justice, the standard should not be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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